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Supreme Court, U.S.
FILED

04-848 NOV 1 - 2004

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IN THE SUPREME COURT OF THE UNITED STATES

BARBARA DOLAN
Petitioner

v.

UNITED STATES OF AMERICA
and THE UNITED STATES POSTAL SERVICE
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does not this case - which involved a determination of whether the district court had jurisdiction over the claim of plaintiff when her injury was caused by the negligent placement of mail at the place of delivery - call for an exercise of this Courts supervisory power where there is a dispute between the circuits of the Court of Appeals as to whether the exception to the Federal Tort Claims Act, 28 U.S.C. § 2680 (b) barred this lawsuit and where the Third Circuit narrowly construed the Act?

(Answered in the negative by the Court below)

THE PARTIES TO THE PROCEEDING

Barbara Dolan
Michael Dolan
308 Tyson Avenue
Glenside, PA 19038
Petitioners

United States of America
Department of Justice
Room 5111
10th and Constitution Avenue NW
Washington, DC 20530
Respondent

The United States Postal Service
475 L'Enfant Plaza SW
Washington, DC 20260
Respondent

CORPORATE DISCLOSURE STATEMENT

Plaintiff is not a corporation

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The Order and Opinion of the United States District Court for the Eastern District Court for the Eastern District of Pennsylvania entered March 19, 2003 was not reported and is set forth in the Appendix at page 1a.

The Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit, Scirica, Chief Judge, Roth and McKee, Circuit Judges, entered August 2, 2004, affirming the judgment of the District Court is reported at **Dolan v US Postal Service**, 377 F3d 285 (3rd Cir. 2004). The Judgment and Memorandum Opinion are set forth in the Appendix at page 13a.

STATEMENT OF THE BASIS FOR THE JURISDICTION IN THIS COURT

The Judgment sought to be reviewed was entered by the Court of Appeals for the Third Circuit on August 2, 2004.

The statutory provision believed to confer jurisdiction on this Court to review on a writ of certiorari the judgment of the Court of Appeals is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 12 (b) (1) provides:

b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
(1) lack of jurisdiction over the subject matter,

28 U.S.C. Section 2680 (b) provides:

The provisions of this chapter and section 1346 (b) of this title shall not apply to: ...

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

STATEMENT OF THE CASE

The basis for Federal Jurisdiction In The Court of First Instance

The district court had jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b).

The Facts Material to Consideration of the Questions Involved

1. Procedural Background

This matter was commenced by Petitioners, Barbara Dolan and Michael Dolan, against the United States Postal Service and the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b). The appeal was taken on behalf of Petitioner, Barbara Dolan.

This case arose on August 25, 2001. This matter arose from Respondents' alleged negligence in placing the delivery of mail in such a way as to cause serious personal injuries to Petitioner, Barbara Dolan. Respondents filed a Motion to Dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12 (b) (1). The Motion alleged that the exception to the waiver of immunity set forth at 28 U.S.C. § 2680 (b) barred Plaintiff's claim. Said exception states that the Act does not

apply to "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters". Petitioner filed an Answer to the Motion to Dismiss,

On March 19, 2003, the District Court entered an Order granting the Motion to Dismiss. On August 2, 2004, the Third Circuit affirmed finding that in the context of delivering letters or postal matter, "transmission" means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when it is delivered.

2. The Material Facts - Not in Dispute

The facts in this matter are simple and not in dispute. On or about August 25, 2001, Petitioner, Barbara Dolan, suffered serious personal injuries when she fell over certain packages that had been left on the porch of her property rather than the normal area for leaving of the mail. Petitioner's injuries included her wrists, large right pneumothorax, strain and sprain of the thoracic spine, strain and sprain of the lumbar spine, C4-5 and C5-6 circumferential disc bulges, L3-4 disc bulging, thoracic discogenic disease at T6-7 and T7-7 and lumbar discogenic disease.

In compliance with 28 U.S.C. § 2675, Petitioner filed an administrative claim prior to filing the Complaint. On or about April 18, 2002,

the claim was denied administratively and the Complaint was filed within 6 months of the denial.

The above facts are not at issue in this case. The matter is instead a question of law as to whether the exception to the waiver of immunity in the Federal Tort Claims Act set forth in 28 U.S.C.§ 2680 (b) was applicable to the actions of the Postal Service in this case.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Third Circuit Court of Appeals incorrectly defined "transmission" as set forth in 28 U.S.C. § 2680 (b) and narrowly construed the Act in direct conflict with the Decision of the Second Circuit Court of Appeals and Congressional Intent

The Second Circuit in **Raila v United States**, 355 F.3d 450(2d Cir. 2004), held that the words "negligent transmission" are limited to the loss or miscarriage of postal material. In this matter, the Third Circuit disagreed and held that "transmission" means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when it is delivered. The conflict between the holdings of the Circuits calls for the exercise of this Court's supervisory power.

The Federal Tort Claims Act, 28 U.S.C. § 1346 (b) waives the government's immunity from tort liability except in certain circumstances. Here Respondent has argued that the exception to the waiver set forth in 28 U.S.C. § 2680 (b) deprived the District Court of subject matter jurisdiction. This exception sets forth that the provisions of this Title shall not apply to "any claim arising out of the loss, miscarriage, or **negligent transmission of letters or postal matters**" (emphasis added).

Federal Rule of Civil Procedure 12 (b) (1) permits the lack of jurisdiction of the subject matter to be raised by Motion. Challenges to subject matter jurisdiction under Rule 12(b)(1) may be "facial" or "factual." Facial attacks, like this one, contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true. **NE Hub Partners, L.P. v. CNG Transmission Corp.** 239 F.3d 333, 341 & n. 7 (3d Cir.2001). Therefore the issue before the District Court was whether, accepting the allegations in the Complaint as true, this Complaint should have survived Respondent's Motion

The Complaint alleged that Petitioner was lawfully on her premises when she was caused to slip, trip, stumble and/or fall by reason of a dangerous and hazardous condition created by Respondent in improperly placings letters, packages or periodicals on the porch of the said property (Complaint, Paragraph 7). The Complaint then enumerated specific acts of negligence allegedly committed by Respondent (Complaint, Paragraph 8). Plaintiff suffered serious and permanent injuries as a result of the alleged negligence including her wrists, large right pneumothorax, strain and sprain of the thoracic spine, strain and sprain of the lumbar spine, C4-5 and C5-6 circumferential disc bulges, L3-4 disc bulging, thoracic discogenic disease at T6-7 and T7-7 and lumbar discogenic disease. (Complaint, Paragraph 9). The Complaint then alleged that Petitioner was caused to expend large sums of

money to treat said injuries, that she has been prevented from her normal duties and occupation and has suffered great physical pain and mental anguish. (Complaint, Paragraphs 10-12).

The Federal Tort Claims Act waives the government's immunity from suit in sweeping language. As stated in **United States v Yellow Cab Co**,, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 2d 523 (1951), the immunity is definitely waived in favor of the injured person. At page 554, the Court said:

> "In argument before a number of District Courts, the government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional intent in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in **Anderson v Hayes Construction Co.** 243 NY 140, 147, 153 NE 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not about to add to its rigor by refinement of construction where consent has been announced"

Most governmental employees, if committing a similar act of negligence would not be immune from suit. The question therefore was, does the rationale

behind the exclusion set forth in §2680 (b) apply to an act such as alleged here? This question must be considered against the backdrop of the liberal reading of the Act.

Even prior to **Raila** and this matter there was no one definition of transmission of the mail. For example in **Robinson v United States**, 849 F. Supp. 799, 802 (S.D. Ga. 1994) transmission was defined as "when a postal patron deposits postal matter with the Postal Service and would end when the postal matter was delivered by the Postal Service to a third-party". However the District Court for the Eastern District of Pennsylvania in **Suchomajcz v United States**, 465 F. Supp 474 (E.D. Pa. 1979) limited negligent transmission of the mails to injury done to the package or letter while in transit.

The Court in **Suchomajcz** discussed the legislative history at length. At page 476 the Court writes:

> "However, an examination of the legislative history and Congressional intent behind the postal exception reveals that plaintiff's claim is not barred. As pointed out by Judge Weinstein from the Eastern District of New York, "Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary,

> accepted operations of delivering millions of packages and letters each year." **Birnbaum v. United States**., 436 F. Supp. 967, 974 (E.D.N.Y.1977). A Justice Department official explained the rational behind the postal exception: Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay, the government could be sued for damages. Consequently, this provision was inserted.
> Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong. 3d Sess. 38 (1940) (testimony of A. Holtzoff, Special Assistant to Attorney General of the United States). In previous testimony Mr. Holtzoff had commented that the theory behind the exceptions was to "exempt certain tort claims that would be difficult to defend, or in respect to which it would be unjust to make the government liable." Id. at 22.

The testimony of Mr. Holtzoff quoted in **Suchomajcz** is particularly instructive of the legislative purpose behind §2680 (b). The Postal

Service handles incalculable amounts of mail every day. Despite its best efforts and the most modern and sophisticated systems, mistakes occur, letters and packages are damaged or lost and people are in some way damaged by these events. To permit these events to be actionable would have a chilling effect to the delivery of mail, open the floodgates of litigation and have very real consequences. The exception was inserted to deal with loss or delay of the mail. Plaintiff asserts that, the common thread in the cases that should be subject to the exclusion is that it is impossible to prove negligence or for the government to defend itself.

In **Raila** at p. 121, the Court noted

"As the Supreme Court observed:
The specificity of 2680(b), in contrast with the generality of 2680 (c), suggests, if anything, that Congress intended the former to be *less* encompassing than the latter. The motivation for such an intent is not hard to find. One of the principal purposes of the [FTCA] was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault. In order to ensure that 2680(b), which governs torts committed by mailmen, did not

have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility – namely, "the loss, miscarriage, or negligent transmission of letters or postal matter" – thereby excluding, by implication, negligent handling of motor thereby excluding, by implication, negligent handling of motor vehicles. **Kosak v. United States**, 465 U.S. 848 at 855 (emphasis in original)

The Court in **Raila** noted that the government's interpretation can lead to absurd results. For example, a driver throws a package toward a home to which it is to be delivered and strikes and injures a pedestrian. The exception would apply whereas if the same driver was to strike a pedestrian with his vehicle while taking his eyes off the road, there would be liability.

The facts in **Raila** are virtually identical to those in the instant case. Plaintiff there was injured when she slipped on a package that had been placed immediately below her front door step by an employee of the USPS. The 2nd Circuit held that the postal matter exception, 28 U.S.C. § 2680 (b) does not bar plaintiff's claims.

The 3rd Circuit in the within case approached the matter differently stating that any ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government. **Lane v Pena**, 518 U.S. 187, 192 (1996). Further, the Court held that the expansive language of the phrase "(a)ny claim arising out" evinced Congress's intent to broaden rather than limit the exception for "negligent transmission of letters or postal matter" Finally, the Court held that the "ordinary accepted operations" of the USPS must of necessity encompass more than merely the mechanical sorting and transfer of mail.

Petitioner asserts that the 2nd Circuit's opinion should be adopted by this Court. Postal workers cannot negligently leave the mail in a location where individuals can be injured just as they can't drive their postal vehicles in a negligent manner and escape liability. The Federal Tort Claims Act ("FTCA") describes one of the limited instances where the United States waives its sovereign immunity and consents to civil suit. *See* 28 U.S.C. § 1346(b),§§ 2671-80. Under the FTCA, a private party may sue the United States: "for personal injury ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b).

The 3rd Circuit based its decision on a narrow definition of the term "transmission". The Court pays lip service to the legislative history of the exclusion but doesn't discuss the testimony cited above. Rather it bases its decision on a narrow definition of the term "transmission". The definition of transmission is " the act, process or instance of transmitting." Webster's Ninth New Collegiate Dictionary at page 1254. The Oxford University Press defines the word "transmit" as "to cause to pass on from one place or person to another."

The Third Circuit agreed with the opinion of the District Court that: "In the context of delivering letters or postal matter, the process of conveying from one person to another starts when the USPS receives the letter or postal matter and ends when the USPS delivers the letter or postal matter" This definition does not have any citation to any other case or authority. Petitioner asserts that this definition is not consistent with the intent of the Act and should not be followed by this Court.

This Court has noted in dicta that "[o]ne of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault." **Kozak** at 854. Plaintiff asserts that this is in fact a showing of how Congress wished the Act to be read and how the 2nd Circuit construed the exception in **Raila**. If there were clear negligent acts of the employee of the postal service, this

would not expose the United States to excessive or fraudulent claims.

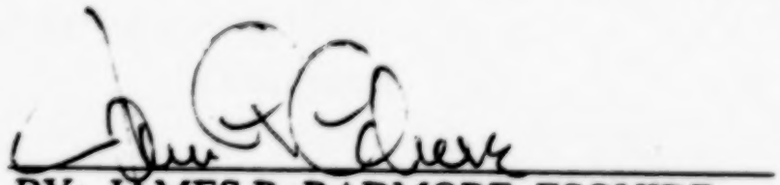
As hereinbefore stated, the rationale for the exclusion is clear, rational and succinctly stated in the legislative history. It is easy to imagine the type of cases to which the Postal Service would be subjected to if this exclusion were not the law. What would stop someone who says they mailed their mortgage company their check and then finds themselves subject to foreclosure from suing the Postal Service as a result? What would stop a business who has an important document damaged in the mail from doing likewise? The lawsuits to which the Postal Service would be subject to for occurrences while the mail is in "transmission" is limited only by ones imagination. Negligently placing a package in such a way that one is caused to fall and suffer serious injuries is quite different and not what the exclusion was meant to prevent.

The issues herein are important and relate to significant issues worthy of this Court's attention. That two Circuits have thoroughly examined the issue and reached contradictory opinions indicates that this is a matter requiring this Court's supervisory powers and direction.

CONCLUSION

WHEREFORE, Petitioner prays this Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
LAW OFFICES OF JAMES R. RADMORE.P.C.



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA DOLAN et al., Plaintiffs	:	CIVIL ACTION
v.	:	
THE UNITED STATES POSTAL SERVICE et al. Defendants	:	NO. 02-7891

MEMORANDUM and ORDER

McLaughlin, J. March ____, 2003

The plaintiffs, Barbara and Michael Dolan have sued the United States and the United States Postal Service ("USPS") under the Federal Tort Claims Act ("FTCA"). Barbara Dolan alleges that she suffered injuries when she

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1 In analyzing a motion to dismiss for lack of subjectmatter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Court must "treat the allegations of the complaint as true and afford the plaintiff[s] the favorable inferences to be drawn from the complaint." NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 (3d Cir. 2001) (citations omitted).

tripped and fell on mail that was negligently placed on a porch by a USPS employee. Her husband, Michael Dolan, alleges that he has been deprived of the consortium of his wife because of her injuries. Pending before the Court is the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction or in the alternative, for summary judgment. The Court will grant the motion.

The facts of this case, in the light most favorable to the plaintiffs, are as follows. 1 On August 25, 2001, Mrs. Dolan was on the premises of 308 Tyson Avenue. An employee of the USPS placed letters, packages, and periodicals on the porch of the residence. Mrs. Dolan slipped and fell on the mail. As a result of the fall, Mrs. Dolan suffered injuries. Compl. at ¶¶ 7-8.

The plaintiffs concede in their opposition to the

defendants' motion that the USPS is not a proper defendant under the FTCA. See Pl. Opp'n at 9. With respect to Mrs. Dolan's suit against the United States, the question is whether leaving the mail on the porch was a negligent transmission of the mail within the meaning of the FTCA exception that bars suits arising out of negligent transmission of the mail.

As a general rule, the United States cannot be sued unless Congress explicitly waives its sovereign immunity.The question of whether the government enjoys sovereign immunity is one of subject-matter jurisdiction. United States v. Bein, 214 F.3d 408, 412 (3d Cir. 2000).

The FTCA waives the government's sovereign immunity when government employees act negligently within the scope of their official duties. 28 U.S.C. § 1346(b); see Cestonaro v. United States, 211 F.3d 749, 753 (3d Cir. 2000). There are several enumerated exceptions to the FTCA's

waiver of sovereign immunity that are listed in 28 U.S.C. § 2680. The exception relevant in the present case is 28 U.S.C. § 2860(b), which states that the FTCA does not apply to "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters."

In construing an exception to the FTCA's waiver of sovereign immunity, the proper role for a court is "to identify those circumstances which are within the words and reasons of the exception - no less and no more." Kosak v. United States, 465 U.S. 848, 854 n.9 (1984). The starting point for interpreting an exception to the FTCA is the actual language of the statute. After determining what the language at issue means, a court may also examine: (1) the context of the exception; (2) the legislative history of the exception; and (3) Congress's general purposes in creating exceptions to the FTCA. The general purposes of the FTCA exceptions are to

ensure that certain governmental activities not be disrupted by the threat of damages suits, to avoid exposure of the United States to excessive or fraudulent claims, and to not extend the FTCA to suits for which adequate remedies are already available. See id. at 853, 855-56, 858 & n.16.

Evidence outside of the actual language of an exception to the FTCA is not used to define the exception. Instead, a court may look to outside evidence to ensure that a court's construction of an exception is not undercut by any indication that Congress intended the exception to apply more narrowly. See id. at 858 n.16.

Whether the plaintiffs' suit is barred turns on the meaning of "negligent transmission" within the meaning of Section 2680(b). "Transmission" is the "act, process or instance of transmitting." Webster's Ninth New Collegiate Dictionary at 1254. "Transmit" means "to send or convey

from one person or place to another." See Black's Law Dictionary 1505 (7th ed. 1999). In the context of delivering letters or postal matter, the process of conveying from one person or place to another starts when the USPS receives the letter or postal matter and ends when the USPS delivers the letter or postal matter.

Negligently placing mail on a porch falls squarely within the plain meaning of "negligent transmission" as that term is used in Section 2680(b). Transmission of the mail was not complete until the USPS employee placed the mail on the porch. The plaintiff's accident arose out of the USPS employee's alleged negligence in placing the mail on the porch. As such, Mrs. Dolan's suit is barred by Section 2680(b) because it arose out of negligent transmission of the mail.

There is no indication that Congress intended "negligent transmission" to be read more narrowly. The

context of "negligent transmission" is that it is part of a statutory provision eliminating the government's waiver of sovereign immunity for conduct related to certain postal operations. Nothing about placing "negligent transmission" within an exception to the FTCA's waiver of sovereign immunity for conduct related to certain postal operations undercuts the Court's interpretation of Section 2680(b).

As noted by other courts, the legislative history of Section 2680(b) shows that the purpose of the section was to prevent the courts from dealing with a landslide of lawsuits generated from unavoidable mishaps incident to the ordinary, accepted operations of the USPS. See Suchomajcz v. United States, 465 F. Supp. 474, 476 (E.D. Pa. 1979); Birnbaum v. United States, 436 F. Supp. 967, 974 (E.D.N.Y. 1977); see also Hearings Before Senate Committee on Judiciary on S. 2690, 76th Congress, 3d Sess. 38 (1940) (testimony of A.

Holtzoff, Special Assistant to the Attorney General of the United States). There is nothing out of the ordinary about a USPS employee delivering the mail or placing the mail on the porch instead of in the mailbox. Mrs. Dolan's accident was incident to the USPS employee placing the mail on the porch. Because the USPS employees do not monitor how mail they deliver is retrieved by patrons of the USPS, mishaps related to the retrieval of the mail are unavoidable.

Finding Mrs. Dolan's suit to be barred by Section 2680(b) is consistent with Congress's general purposes in creating FTCA exceptions. Allowing the government to be held liable for accidents stemming from the delivery of the mail would pose a threat of disrupting the governmental activity of ensuring that the millions of pieces of mail handled by the USPS are delivered efficiently. The type of claim brought by the plaintiff also has the potential to expose the

United States to liability for excessive or fraudulent claims as there are likely to be no witnesses to observe the events after the completion of delivery.

The plaintiffs have not cited, nor is the Court aware of, any cases interpreting Section 2680(b) to allow the type of claim brought by Mrs. Dolan. The only cases cited by the parties interpreting Section 2680(b) in the context of a person suing the government because of injuries suffered as a result of slipping on negligently placed letters or postal matter are Bono v. United States, 145 F. Supp. 2d 441 (D.N.J. 2001) and Hunt v. United States, No. 01-2462, 2002 WL 553736 (D. Kan. Apr. 4, 2002). In both cases, the courts interpreted Section 2680(b) to preclude the type of suit brought by the present plaintiff. The Court agrees with these other courts that the type of claim brought by Mrs. Dolan is barred under

Section 2680(b) because the claim arose out of negligent transmission of the mail.

The plaintiffs' reliance on Suchomajcz v. United States, 465 F. Supp. 474 (E.D. Pa. 1979), for a more restrictive interpretation of "negligent transmission" is misplaced. In Suchomajcz, six children were burned by firecracker assembly kits delivered by the USPS after the government had obtained several injunctions against the maker of the firecracker assembly kits enjoining him from sending the kits through the mail. The Suchomajcz plaintiffs' claim was not barred by the Section 2680(b) exception because it was an allegation that the USPS was negligent in not failing to stop the mail altogether, and not a claim that the USPS was negligent in the transmission of the mail. Id. at 476-77.

Unlike the plaintiffs in Suchomajcz, the plaintiffs in the present case are not arguing that the USPS was negligent in

failing to stop the mail from being delivered. Instead, the plaintiffs argue that the USPS was negligent in how it deliveredthe mail. Negligent delivery of the mail falls within the definition of negligent transmission of the mail.

Despite the plaintiffs' assertions to the contrary, construing Section 2680(b) to bar the plaintiffs' suit does not result in the purposes of the FTCA being frustrated. In Kosak, the Supreme Court noted that one of the principal purposes of the FTCA was to waive sovereign immunity for injuries resulting from automobile accidents in which employees of the USPS were at fault. To ensure that it did not bar a suit by a person injured in an auto accident where a USPS employee was at fault, Congress carefully delineated what type of suit Section 2680(b) barred. Because the negligent handling of motor vehicles was not listed in Section 2680(b), the Supreme Court reasoned that by implication a suit based on negligent

handling of a motor vehicle was not excepted. Kosak, 465 U.S. at 855. Negligent transmission of the mail, as opposed to negligent handling of a motor vehicle, was explicitly included in Section 2680(b). As negligent transmission of the mail includes negligent delivery of the mail, the plaintiffs' suit is barred by the words of Section 2680(b).

Mr. Dolan's loss of consortium claim is wholly derivative from his wife's tort claim. Because Barbara Dolan's claim is barred, Michael Dolan's wholly derivative loss of consortium claim is necessarily dismissed. See Murray v. Commercial Union Ins. Co., 782 F.2d 432, 437-38 (3d Cir.1986).

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA DOLAN et al., Plaintiffs	:	CIVIL ACTION
v.	:	
THE UNITED STATES POSTAL SERVICE et al. Defendants	:	NO. 02-7891

ORDER

AND NOW, this day of March, 2003, upon consideration of the defendants' Motion to Dismiss or in the Alternative, for Summary Judgment (Docket No. 5), and the plaintiffs' opposition thereto, IT IS HEREBY ORDERED that the motion is GRANTED for the reasons set forth in a memorandum of today's date. This case is hereby dismissed.

BY THE COURT:

/s/ McClauglin, J.
MARY A. MCLAUGHLIN, J.

United States Court of Appeals,
Third Circuit.

Barbara DOLAN; Michael Dolan, W/H, Appellants
v.
THE UNITED STATES POSTAL SERVICE; United States of America.

No. 03-1840.

Submitted Under Third Circuit LAR 34.1(a) on Feb. 10, 2004.
Aug. 2, 2004.

Background: Postal customer brought suit against government under Federal Tort Claims Act (FTCA) seeking to recover for injuries suffered when she tripped over mail negligently left on her porch by mail carrier. The United States District Court for the Eastern District of Pennsylvania, Mary A. McLauglin, J., dismissed for lack of subject matter jurisdiction. Customer appealed.

Holding: The Court of Appeals, Roth, Circuit Judge, on issue of first impression in the Third Circuit, held that negligent transmission of mail, within exception to waiver of sovereign immunity under FTCA, included negligent delivery by postal carriers.
Affirmed.

Before SCIRICA, Chief Judge, ROTH and MCKEE, Circuit Judges.

OPINION

ROTH, Circuit Judge.

Appellant Barbara Dolan was injured allegedly as a result of mail negligently placed on her porch by a United States Postal Service (USPS) employee. Having properly exhausted her administrative remedies, Dolan filed a claim under the Federal Tort Claims Act (FTCA) in the United States District Court for the Eastern District of Pennsylvania. Citing 28 U.S.C. § 2680(b)' s exception to the FTCA for negligent transmission of the mail, the government filed a Fed.R.Civ.P. Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and the District Court granted it. Dolan appeals, arguing that § 2680(b)'s exception does not include immunity for the negligent delivery or placing of the mail. This is an issue of first impression in this Circuit After careful consideration, we conclude that the District Court was correct in its determination and will affirm.

I. Factual and Procedural History

On August 25, 2001, Dolan fell over letters, packages and periodicals placed by a USPS employee on her porch. As a result of the fall, Dolan suffered serious injury.

In compliance with 28 U.S.C. § 2675 , Dolan filed an administrative claim prior to filing her FTCA complaint. This administrative claim, however, was denied on April 18, 2002. On October 15, 2002, Dolan filed a complaint under the FTCA against the United States and the USPS in the United

States District Court for the Eastern District of Pennsylvania. Her husband, Michael Dolan, also filed a FTCA claim for loss of consortium.

On February 7, 2003, the government filed its Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The Dolans responded, conceding that the United States was the only appropriate defendant but otherwise opposing the motion.

On March 19, 2003, the District Court granted the government's motion to dismiss, holding that Barbara Dolan's claim was barred by 28 U.S.C. § 2680(b). The District Court also dismissed Michael Dolan's claim because it was derivative of his wife's claim.

On appeal, the Dolans concede that Michael Dolan did not timely exhaust his administrative remedies. Thus, the only the question before us is whether the District Court properly dismissed Barbara Dolan's claim for lack of subject matter jurisdiction.

II. Jurisdiction and Standard of Review

Because the Dolans brought their claim under the FTCA, the District Court had jurisdiction pursuant to 28 U.S.C. § 1346(b). We have appellate jurisdiction under 28 U.S.C. § 1291. Our review is plenary where the District Court dismisses for lack of subject matter jurisdiction. *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir.2000).

III. Discussion

"It is a fundamental principle of sovereign immunity that federal courts do not have jurisdiction over suits against the United States unless Congress, via a statute, expressly and unequivocally waives the United States' immunity to suit." *United States v. Bein*, 214 F.3d 408, 412 (3d Cir.2000) (citing *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)). "[W]hen the Government does consent to be sued, 'the terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction.' " *Id.* (quoting *United States v. Mottaz*, 476 U.S. 834, 841, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986)). "Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed, and any such waiver must be construed strictly in favor of the sovereign." *Id.* (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)) (internal quotation marks omitted). The FTCA waives the government's sovereign immunity when government employees act negligently within the scope of their official duties. 28 U.S.C. § 1346(b).

At issue here is an exception to the FTCA which provides that this waiver shall not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters." 28 U.S.C. § 2680(b). Dolan contends that the words "negligent transmission" in § 2680(b) do not include a USPS employee's negligent placing of the mail. In essence, she invites us to read § 2680(b) as only providing the government immunity for mail lost, delayed or damaged in transit.

Relying on *United States v. Yellow Cab Co.*, 340 U.S. 543, 554, 71 S.Ct. 399, 95 L.Ed. 523 (1951), Dolan argues that, under the FTCA, immunity is generally waived in favor of the injured party. Dolan also cites § 2680(b)' s legislative history as discussed in *Suchomajcz v. United States*, 465 F.Supp. 474, 476 (E.D.Pa.1979), in support of her more narrow definition of "negligent transmission." She points out that the District Court in *Suchomajcz* noted that in passing § 2680(b) "Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary accepted operations of delivering millions of packages and letters each year." *Id.*, 465 F.Supp. at 476 (quoting *Birnbaum v. United States*, 436 F.Supp. 967, 974 (E.D.N.Y.1977)). Dolan maintains that this history indicates Congress only intended § 2680(b) to protect the government from claims resulting from the loss or delay of mail, not torts resulting from negligently placed mail. While she concedes that *Bono v. United States*, 145 F.Supp.2d 441 (D.N.J.2001), the only prior case in this Circuit to substantially address the facts and issue at hand, interpreted § 2680(b) to bar the type of suit she now brings, Dolan argues that both *Bono* court and the District Court in this case erred in reading the statutory definition of "transmission" to include negligent placing or delivery of the mail. Finally, she alleges that the FTCA's underlying objectives are not served by a broad definition of "negligent transmission." *See* *Kosak v. United States*, 465 U.S. 848, 858, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984).

While we note that the Second Circuit Court of Appeals recently held in *Raila v. United States*, 355 F.3d 118 (2d Cir.2004), that the words "negligent transmission" are limited

to the loss or miscarriage of postal material, we disagree with that holding. To the extent that "negligent transmission" is ambiguous at all, any ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government. *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). Construing 2680(b) in such a way is made all the easier by the statute's expansive language. The phrase "[a]ny claim arising out" evinces Congress's intent to broaden rather than limit the exception for "negligent transmission of letters or postal matter." [FN1]

FN1. *Robinson v. United States*, 849 F.Supp. 799 (S.D.Ga.1994), reached a similar interpretation of § 2680(b)'s language. *Id.* at 802 (citing *Kosak*, 465 U.S. at 854, 104 S.Ct. 1519).

Moreover, § 2680(b)'s legislative history makes plain that Congress intended to protect the government from lawsuits that might be generated by the unavoidable mishaps incident to the ordinary accepted operations of delivering millions of packages and letters each year. *Suchomajcz*, 465 F.Supp. at 476. Notwithstanding Dolan's arguments to the contrary, the USPS's "ordinary accepted operations" of necessity must encompass more than merely the mechanical sorting and transfer of the mail. Indeed, it is hard to imagine a more ordinary accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees.

We thus agree with the District Court that there is nothing out of the ordinary about a USPS employee delivering the mail or placing the mail on the porch instead of in the

mailbox. Dolan's accident was incidental to the USPS employee placing the mail on the porch. Because USPS employees do not monitor how the mail they deliver is retrieved by third-parties, mishaps related to the retrieval of the mail may be unavoidable.

We hold therefore that in the context of delivering letters or postal matter, "transmission" means the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter. Such an interpretation of § 2680(b) furthers the FTCA's underlying objectives, particularly those of ensuring that a key governmental activity will not be disrupted by damage suits and of limiting the exposure of United States to excessive or fraudulent claims. *See* *Kosak*, 465 U.S. at 858, 104 S.Ct. 1519.

IV. Conclusion

For the foregoing reasons, we will affirm the judgment of the District Court.